IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-971

STATE OF NORTH CAROLINA EX. REL. SARAH T. MORROW; STATE OF NEBRASKA; AMERICAN MEDICAL ASSOCIATION; AND NORTH CAROLINA MEDICAL SOCIETY *Appellants*

v.

JOSEPH A. CALIFANO, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; AMERICAN ASSOCIATION FOR COMPREHENSIVE HEALTH PLANNING, INC.; AND NATIONAL ASSOCIATION OF NEIGHBORHOOD CENTERS, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC. IN SUPPORT OF JURISDICTIONAL STATEMENT

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MOTION OF ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF JURISDICTIONAL STATEMENT

Pursuant to Rule 42 of the Rules of this Court, the Association of American Physicians and Surgeons, Inc., respectfully moves the Court for leave to file a brief *amicus curiae* in the above--entitled case. Counsel for the movant mailed letters to counsel representing each of the respective Appellants and Appellees on December 2, 1977, inquiring whether each would give consent to the filing of a brief *amicus curiae*. As of the date the within motion is filed all but one of the parties have responded. Consent has been granted by the Solicitor General of the United States and Counsel

for the Appellee, American Association for Compresive Health Planning, Inc. The State of Nebraska has, likewise, given its complete consent. The American Medical Association, the North Carolina Medical Society and the State of North Carolina consented to the filing of a brief *amicus curiae* by the Association of American Physicians and Surgeons, Inc. provided "leave of the Supreme Court was obtained."

In support of the motion of the Association of American Physicians and Surgeons, Inc., for leave to file a brief *amicus curiae,* the Association states that it is a voluntary association formed by private, practicing physicians and surgeons in 1943. It is the largest association with nationwide membership in the United States devoted exclusively to representing the physician in the practice of private medicine. The Association has members in every State and territory in the United States, and in the District of Columbia. In addition, a substantial number of its members are not members of the American Medical Association, an Appellant herein, or of those medical associations within that federation. Thus many physicians who are members of the Association of American Physicians and Surgeons, Inc., are not represented by or through any of the parties to the instant appeal, yet will be directly and adversely affected by the comprehensive scheme of regulation of the practice of medicine and delivery of health care contemplated by the National Health Planning and Resources Development Act of 1974, 42 *U.S.C.* Subsection 300 k *et seq.*

A substantial number of the members of the Association have invested in, operate and maintain private health care facilities, the regulation of which is

the purpose of the "Act" in question. Certainly, their individual interests are at stake in the pending litigation, since such broad powers are granted to the Appellee Secretary of the Department of Health, Education and Welfare to regulate such private facilities, and even direct their "conversion to new uses."

The accompanying brief *amicus curiae* espouses the fundamental philosophy of the Association and its individual members, and presents an argument in both law and history which is unique to the instant case. Of importance to the Association is the argument, based upon the doctrine of Separation of Powers that quite independently of the Bill of Rights and the Fourteenth Amendment, the ***fundamental structure of the government of the United States*** guarantees the protection of personal liberties, *vested rights*, and, ultimately, vitality of local government.

The Association, additionally, presents the argument that the Founding Fathers were keenly aware that to preserve the Republic a yardstick must be exercised, by Courts, *quite independently of popular will,* to gauge the action of government. That, as the Court legitimately and properly found judicial review implied in the doctrine of separation of powers, so it must also find a historic duty to safeguard private property, individual liberty and fundamental, ***vested rights*** against arbitrary interference by the Congress, regardless what the popular will may be.

To a significant extent, the accompanying brief *amicus curiae* offered by the Association of American Physicians and Surgeons, Inc., relies upon principles of federalism and republican government, and, upon the doctrine of separation of powers. It is unique,

therefore, to the case at bar and such argument, otherwise, would not be brought before this Honorable Court.

CONCLUSION

For the above stated reasons, the Association of American Physicians and Surgeons, Inc., respectfully urges this Honorable Court to grant this motion for leave to file the accompanying brief *amicus curiae* in the present case in support of the jurisdictional statement.

Respectfully submitted,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC. IN SUPPORT OF THE JURISDICTIONAL STATEMENT

MAY IT PLEASE THE COURT:

This brief *amicus curiae* in support of the Jurisdictional Statement is filed by the Association of American Physicians and Surgeons, Inc., by Motion, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC.

The Association of American Physicians and Surgeons, Inc., is the largest association in the United States devoted exclusively to representing the physician in the practice of private medicine. The Association has members in every State and territory in the United States and in the District of Columbia. In addition, a substantial number of its members are not members of the American Medical Association, an Appellant herein, or of those medical associations within that federation. Thus, many physicians who are members of the Association of American Physicians and Surgeons, Inc., are not represented by or through any of the parties to the instant appeal, yet will be directly and adversely affected by the comprehensive scheme of regulation and control of the practice of medicine and delivery of health care contemplated by the National Health Planning and Resources Development Act of 1974, 42 *U.S.C.* Subsection 300 k *et seq.* (hereinafter referred to as the "Act"). Members of the Association thus have a significant and concrete interest in the outcome of this appeal.

While believing that the Appellants in the instant case are seriously and skillfully defending their interests, the Association of American Physicians and Surgeons, Inc., is concerned lest their natural preoccupation with the issues which interest them most immediately will cause them, and hence this Court, to overlook the deeper, broader, and more ominous issues involved. The members of the Association, thus, are not adequately represented by the Appellants herein.

The Association believes that the legislation under attack here is premised upon the conclusion of the Congress of the United States that, under the *taxing and spending power*, like under the Commerce Clause, that body may regulate any and all activity conducted by mankind — so long as that activity, *somehow*, is clothed with some "national interest." The Members of the Association, being philosophically opposed to such a premise, it is their individual and collective belief that Congress has, under the "Act," arrogated to itself the power to annihilate, absolutely, the autonomy, and hence the responsibility and integrity, of state and local governments and, in addition, has arrogated to itself the power to errode the concept of, and, in fact, confiscate private property.

Specifically, the Association believes that if the "Act" in question is upheld Congress will have successfully blurred beyond recognition the distinctive lines between federal and state government, and the fundamental limitations placed, constitutionally, upon the government of the United States as being one of "limited and enumerated powers."

Being representative of private, practicing physicians only, the Association believes the most damaging impact of the "Act" in question will be upon the private, practicing physician who, even though he neither seeks nor receives money from the government, will, under the "Act," be directed to practice in specific institutions, utilize and invest in only such equipment as the federal government may approve, and thus be unable to render care to patients based upon his own best knowledge, judgment and resources. Such interference adversely affects the essential liberty a private, practicing physician must enjoy to render optimum health care, and adversely affects the vital "balance of rights" between government and citizens

inherent in the Constitution of the United States.

SUMMARY OF ARGUMENT

It must be accepted doctrine in American Constitutional Law that legislation enacted under the guise of the "common good" may well impair fundamental relationships between the federal government and the governments of the respective states, and may impair or undermine the *vested rights* of individual citizens, and, if either or both of those circumstances occurs or occur, such legislation must fail.

If the impact of the legislation amounts to "coercion" by the federal government of state legislatures, and, thereby, state legislatures are forced to enact legislation, then, regardless of the "common good," that legislation must fail to pass Constitutional muster. "Coercion" of states to legislate violates the very essence of *federalism*, and, importantly, violates the nation's historic and Constitutionally respected committment to *republican government* and the vitality of state and local government. The question circumscribed, therefore, relates to the *inherent nature and structure of the government of the United States.*

Vested rights and guarantees of personal liberty, though specifically found in the first eight amendments to the Constitution of the United States and in the Fourteenth Amendment thereof, are also found in the *fundamental structure of the government of the United States.* Wrote the late Mr. Justice John Marshall Harlan:

> We are accustomed to speak of the Bill of Rights and the Fourteenth Amendment as the principal guarantees of personal liberty. Yet it would be shallow not to recognize that the structure of our political system accounts not less for the free society we have. Indeed, it was upon the structure of government that the Founders primarily focused in writing the Constitution.

Harlan, "Thoughts at a Dedication: Keeping the Judicial Function in Balance," 49 *A.B.A.J.* 943-44 (1963).

To a great extent this brief *Amicus curiae* rests upon the foregoing thought. For, the Association believes that to uphold the "Act" would bury any hope that the fundamental rights and liberties of private citizens of this nation would check and, in turn, counter-balance what has, since 1932, become an uninhibited, albeit, explosive growth of federal authority, control and power.

The Association submits that the "Act" is violative of fundamental principles of *federalism* and *republican government,* for, the said "Act," by threatening the withdrawal of nonrenewal of pre-existing federal grant programs for the citizens of the respective states, coerces and forces the states to legislate requisite "certificate of need" programs. The Association firmly believes, therefore, that the "Act" contravenes both the Tenth Amendment and the "guaranty clause" of Article IV, Section 4, of the Constitution of the United States.

Furthermore, the Association submits that the "Act" unlawfully interferes with the privacy and confidentiality of the physician/patient relationship; and that it, on its face, grants the authority to the Defendant Secretary or those agents and agencies created and established thereunder to "take" private property without due process of law, and, therefore, is violative

of the First, Fifth, Ninth, Tenth and Fourteenth Amendment to the Constitution of the United States, and the doctrine of *vested rights.*

The Association is committed to the ascendance of a very fundamental principle of American Constitutional law which must, necessarily, predominate all specific amendments to the Constitution of the United States wherein rights and liberties are guaranteed, and that is, that the body of the Constitution itself, excluding all amendments, is the guarantor of personal liberty, freedom and individual rights. Wrote Mr. Justice Harlan:

> The Founding Fathers staked their faith that liberty would prosper in the new nation not primarily upon declarations of individual rights, but upon the kind of government the union was to have. It is manifest that no view of the Bill of Rights or interpretation of any of its provisions which fails to take due account of (federalism and separation of powers) . . . can be considered constitutionally sound.

Harlan, "The Bill of Rights and The Constitution," 50 *A.B.A.J.* 918, 920 (1964).

ARGUMENT

I.

THE FEDERAL GOVERNMENT AND THE STATES

A. By Requiring the States to Enact Legislation Upon Penalty of Forfeiture of Federal Funding Under Pre-existing Programs, the National Health Planning and Resources Development Act of 1974 Violates the Tenth Amendment to the Constitution of the United States, in Both Letter and Spirit, and Contravenes Fundamental Principles of Federalism.

Through a series of "interrelated" provisions, beginning with 42 *U.S.C.* Subsection 300 m (a), the National Health Planning and Resources Development Act of 1974 "instructs" the states to enter into and renew agreements with the Secretary of the Department of Health, Education and Welfare for the designation of a State Health Planning and Development Agency for each particular state No agreement may be consummated, however, unless the Governor of the State submits a "State Administrative Program" approved by the Appellee herein, and the State Health Planning and Development Agency has the authority and resources to administer the program. 42 *U.S.C.* Subsection 300 m-1.

The "State Administrative Program" must give the Appellee Secretary adequate assurance that the State agency has the authority *under State law* to carry out the health planning and development function set forth in 42 *U.S.C.* Subsection 300 m-2. See: 42 *U.S.C.* Subsection 300 m-2 (b) (1) (B).

Subsection 300 m-2 (a) (4) (B) of Title 42, *United States Code,* requires the State Agency to "administer a State 'certificate of need' program which applies to new institutional health services proposed to be offered or developed within the State . . " The "certificate of need" program must, under 42 *U.S.C.* Subsection 300 m-2 (a) (4) (B),

> provide for review and determination of need prior to the time such services, facilities, and organizations are offered or developed or substantial expenditures are undertaken in preparation for such offering or development, and provide that only those services, facilities, and organizations found to be needed shall be offered or developed

in the State.

If a state fails to comply with the foregoing, the Appellee Secretary "may not make any allotment, grant, loan or loan guarantee, or enter into any contract under this Act (42 *U.S.C.* Subsection 201 *et seq.*), the Community Mental Health Centers Act (42 *U.S.C.* Subsection 2689 *et seq.*), or the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (42 *U.S.C.* Subsection 4551 *et seq.*) for the development, expansion, or support of health resources in such state until such time as an agreement is in effect." 42 *U.S.C.* Subsection 300 m-3 (d).'

The "Act" is a blunt and brutal challenge to, not only the "sovereignty", but, the "legitimacy" of the States in our federal system. For the State of North Carolina, nothing short of an Amendment of its Constitution would permit it to qualify under the "Act," since the legislation regarding "certificate of need" such as that required by 42 *U.S.C.* Subsection 300 m-2 (a) (4) (B) has been held violative of the North Caro-

[1] No fewer than forty-seven federal grants, all established under pre-existing programs, are being used, here, as the coercive device. Grants for the care, treatment and rehabilitation of the mentally ill [42 *U.S.C.* Subsection 242 (a)], for graduate public health training. [42 *U.S.C.* Subsection 245 (a)], for communicable and other disease control programs [42 *U.S.C.* Subsection 247 (b)], for the planning and development of community health centers [42 *U.S.C.* Subsection 254 (c)], for the support of National Cancer Research and Demonstration Programs and Cancer Control Programs [42 *U.S.C.* Subsections 286 (b) and 286 (c)] and grants to provide training programs in emergency medical services [42 *U.S.C.* Subsection 295 (f) (6)] are among a few of those programs which the Congress and now the Defendant Secretary is using under the "Act" in question, as the coercive lever. The importance of continuing such allotments, grants, loans or loan guarantees and contracts is evident. The fact that they were created and established prior to, and hence, separate and apart from the "Act" in question is also evident.

lina Constitution. *In re Certificate of Need of Aston Park Hospital,* 282 *N.C.* 452, 193 *S.E.* 2d 729 (1973).

It is the contention of the Association that such a requirement contravenes the Tenth Amendment to the Constitution of the United States, and further, is violative of every legal and historical concept of "federalism."

"Federalism" is critical to the nation's existence under the Constitution. Before one may discuss a "popular will" as expressed by the Congress, an appeal must be made to the "popular will" expressed in the Constitution of the United States. Regardless what the Appellees deem is the "social need" upon which the Congress premised the "Act," the federal system cannot, under any legislative finding, be undermined. Wrote Mr. Justice Felix Frankfurter:

> The interpretations of modern society have not wiped out State lines. It is not for us to make indifference to its maintenance or excessive regard for the unifying sources of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity.

Polish National Alliance v. N.L.R.B., 322 *U.S.* 643, 650, (1944).

Though formerly expressed as a "truism" — that "all is retained by the States which has not been surrendered . . .," the Tenth Amendment remains a declaration of the vital and essential relationship between the federal and state governments as that relationship was established by the Constitution before the Tenth Amendment was adopted and ratified.

United States v. Darby Lumber Co., 312 *U.S.* 100, 123-24 (1940).

The Tenth Amendment remains a "compelling reminder of America's search for union without unity." Mason, "The Supreme Court And Federalism," 44 *Tex. L. Rev.* 1187 (July, 1966). "Federalism" cannot coexist with "unity" or "uniformity."

The question raised by the National Health Planning and Resources Development Act of 1974 is whether it is compatible with "union" or whether it compels "unity." To the Association the answer is clear. The "Act" coerces state legislatures to pass specific legislation. It forces, in the case of the State of North Carolina, constitutional amendment. Nothing could be more incompatible with this nation's historic respect for the federal system.[2]

At the very dawn of the Republic's emergence there was ample proof that the formation of the "union" would not invite "unity." James Madison vigorously espoused such a concept. He wrote:

> But, if the Government be national with regard to the *operation* of its powers, it changes its aspect again when we contemplate it in relation to the extent of its powers. The idea of a *national* government involves in it, not only an authority over the individual citizens; but an indefinite supremacy over all persons and things so far as they are ob-

[2]To force the States to enact legislation or to amend their respective Constitutions denies them their essential meaning and purpose. For, by definition, "a State is a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength." Cooley, T. M., *A Treatise On The Constitutional Limitations*, 1 (Boston, 1878); See also: *Chisolm v. Georgia*, 2 *U.S.* (2 Dall.) 419, 440, 457 (1782); *Georgia v. Stanton*, 73 *U.S.* (6 Wall.) 50 (1867).

> jects of lawful Government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general, and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed or abolished by it at pleasure. In the latter the local or municipal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority, than the general authority is to them, within its own sphere. *In this relation then the proposed Government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and invioable sovereignty over all other objects.* (Emphasis added.)

The Federalist, No. 39, 256 (Cook ed., 1967)

When the effect of Congressional legislation has been shown to "coerce" or force states to pass laws, this Honorable Court has invoked Mr. Madison's concept of "federalism." *National League of Cities v. Usery*, 426 U.S. 833 (1976). Quoting Mr. Justice Chase, the Court, in *National League of Cities*, reaffirmed that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 74 *U.S.* (7 Wall.) 700 (1869).

The Court continued by reciting critical language in *Lane County v. Oregon*, 74 *U.S.* (7 Wall.) 71 (1869) at 76. Again, quoting Mr. Chief Justice Chase, the Court stated:

> Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting with

> ample power, directly upon the Citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized.

National League of Cities v. Usery, supra, at 844.

In the words of James Madison, when discussing the "extent" of power, our government is "federal" not "national." *The Federalist*, No. 39, 256 (Cook ed., 1967). To Professor Mason the Tenth Amendment remains a "compelling reminder of America's search for union without unity." Mason, "The Supreme Court and Federalism," 44 *Tex. L. Rev.* 1187 (July, 1966).

As this Honorable Court held in the landmark decision involving legislation enacted under the commerce power, ". . . there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority, but because the Constitution prohibits it from exercising the authority in that manner." *National League of Cities v. Usery*, supra, at 253.

The Association submits that Congressional authority does have limits. Those limits are most pronounced when on considers the *effect* of a given enactment upon the *function* of state government. Whether the Congress of the United States enacts legislation under the "Commerce Clause" of Article I, Section 8, Clause 3, or the "taxing and spending power" of Article I, Section 8, Clause 1, it cannot, under either grant of power,

accomplish the compulsory regulation of the legislatures of State and municipal governments.

To examine the National Health Planning and Resources Development Act of 1974, 42 *U.S.C.* Subsection 300 k *et seq.* is to examine legislation the effect of which is to undermine and curtail the exercise of state legislative initiative. The Act, by its very title, and, by its effect, warps all traditional concepts of "federalism." It "coerces" states to enact "certificate of need" laws and to enter into and renew agreements with the Appellee Secretary of the Department of Health, Education and Welfare for the designation of State Health Planning and Development Agencies. Once such agencies are designated, health planning, regardless of the private interests or investments at stake, is assumed by the federal government. Pre-existing grant programs are used as the "coercive" tool.

The States are given no choice. No state is interested in having its citizens placed in jeopardy. Yet, existing health care education, research and treatment programs will be forfeited if a given state refuses to enter into an agreement with the Appellee Secretary under the "Act." *The choice of denying citizens pre-existing and established health care programs is no choice.* No state could muster the resources necessary to continue the programs currently existing, and which would be denied its citizens if it refused to agree. The States, further, did not accept such programs under the premises of *this* "Act."

Congress has thus "coerced" states to enact "certificate of need" legislation, or, in the case of the State of North Carolina and the State of Nebraska, amend their Constitutions.

Whereas federal law may not be invalid because it may place burdens upon a state to comply, it nevertheless, violates the Tenth Amendment when that law "coerces" the state to legislate. Wrote this Honorable Court in 1926, ". . . neither government may destroy the other nor curtail in any substantial manner the exercise of its powers." *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926).

There simply can be no question that the Constitution, in its entirety, presumes the continued existence of the States. The States are an integral part of the amending process. The Constitution guarantees to each state a republican form of government, and pledges assistance, if requested, against invasion or domestic violence. The new system hammered out in 1787 was to be considered approved when nine of the thirteen States ratified the Constitution. All of the above provisions indicated to the advocates of ratification that "the States would be more than mere administrative districts . . ." Mason, "The Supreme Court and Federalism," 44 *Tex. L. Rev.* 1187, 1197 (July, 1966).

The "understandably apologetic," but forceful opinion of Mr. Justice Miller in the *Slaughter-House Cases*, 83 *U.S.* (16 Wall.) 36 (1972), gives evidence of an implied Constitutional restraint upon the Congress of the United States from interfering in the functions and processes of state governments. Wrote Mr. Justice Miller:

> The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from *the structure and spirit of our institutions;* when *the effect is to fetter and degrade the state governments by subjecting them to the control of Congress,* in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and federal government to each other *and of both these governments to the people:* the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt. (Emphasis added.)

Slaughter-House Cases, supra, at 78.

The above language has been often repeated. *Fry v. United States*, 421 *U.S.* 542 (1975) (Rehnquist dissenting), *Reynolds v. Sims*, 377 U.S. 533 (1964) (Harlan dissenting); *United States v. Darby Lumber Co.*, supra; *United States v. Butler*, 297 *U.S.* 1 (1936).

Though the Association remains philosophically opposed to the expansion of the government of the United States, it is not merely the growth of that government which is at issue. Instead, it is the intrusion of the Congress into, and resulting undermining by the Congress of, those functions of state and municipal governments fundamental and "essential to separate and independent existence" of which it speaks. *Lane County v. Oregon*, supra, at 580.

The Act in question provides no "incentive" upon which States may choose whether or not to participate. It, instead, requires states to enact "certificate of need" legislation, and enter into and renew agreements with the Appellee Secretary, or pre-existing programs, established under separate acts of Congress of the United States, will be dismantled, for, under 42

U.S.C. Subsection 300 m (3) (d), the Secretary "may not make any allotment, grant, loan, or loan guarantee, or enter into any contract under this Act [42 *U.S.C.* Subsection 201 *et seq.*], the Community Mental Health Centers Act [42 *U.S.C.* Subsection 2681 *et seq.*], or the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 [42 *U.S.C.* Subsection 4551 *et seq.*] for the development, expansion, or support of health resources in such state until such time as an agreement is in effect."

The National Health Planning and Resources Development Act of 1970, by threatening the withdrawal or non-renewal of existing federal health programs if the States fail to, legislatively and administratively, comply, unduly interferes in the *functions* of state government. Though the Association recognizes those cases cited by the lower Court regarding the federal government's power to impose terms and conditions upon fiscal grants allotted by it to the States,[3] the Association does not believe that that law grants to the Congress any greater authority or power to interfere in the functions of state government than was intended by the organic law of the nation. *The Slaughter-House Cases,* supra. In fact, as stated by this Honorable Court the Constitution prohibits the Congress from exercising its authority in such a manner. *National League of Cities v. Usery,* supra, at 845.

It is still a Constitution we are interpreting! And, unequivocally, "the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of

[3] *King v. Smith,* 392 *U.S.* 309 (1968); *Oklahoma v. Civil Service Comm'n.,* 330 *U.S.* 127 (1947).

enumerated powers into a central government of unrestrained authority over every inch of the whole nation." *Oregon v. Mitchell,* 400 U.S. 112 (1970).

The National Health Planning and Resources Development Act must be found violative of the Tenth Amendment to the Constitution of the United States and of those historic principles of "federalism" embodied therein.

B. By Requiring the States to Enact Legislation Upon Penalty of Forfeiture of Federal Funding Under A Host of Pre-existing Programs, The National Health Planning and Resources Development Act of 1974 Contravenes the Guaranty Clause of Article IV, Section 4 of the Constitution of the United States.

"Much has been said," spoke Col. George Mason before the Constitutional Convention in June 20, 1787, "of the unsettled state of mind of the people . . ." In two points, however, it was well settled: "1. in an attachment to Republican Government, and 2. in an attachment to more than one branch of the legislature." Farrand, ed.,*Records of the Federal Convention,* I, 339 (New Haven, 1911).

As the new nation's leading exponent of the Constitution, James Madison continued on this theme. He wrote:

> The first question that offers itself is whether the general form and aspect of the government be strictly republican? It is evident that no other form would be reconcileable with the genius of the people of America; with the fundamental principles of the revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the Convention therefore be found to de-

> part from the republican character, its advocates must abandon it as no longer defensible.

The Federalist, No. 39, 250 (Cook ed., 1967).

Mr. Madison's statements, of course, are directed toward the creation of a federal government, yet his statements illustrate the committment of the American public to republican government. Republican government was a "fundamental principle of the revolution." "Could any further proof be required," wrote Madison, "of the republican complexion of this system. the most decisive one might be found in its '. . . express guarantee of the republican form to each of the [States].'" *The Federalist*, No. 39, 253 (Cook ed., 1967).

Attempts to define republican government have, in the past, met with little success. However, as this Honorable Court stated in *National League of Cities v. Usery*, supra, at 845, there are certain fundamental functions of government "essential to a separate and independent existence." Exemplary of such essential functions are "the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves . . ." *In re Duncan*, 139 *U.S.* 449, 461 (1891). Except where specifically authorized to do so, Congress is powerless to interfere. *Erie R. Co. v. Tompkins*, 304 *U.S.* 64, 78-78 (1938).

The National Health Planning and Resources Development Act of 1974 directs state legislatures to enact "certificate of need" legislation, and, upon enacting such legislation, enter into and renew agreements with the Appellee Secretary regarding the implementation of the "Act." If a state legislature fails to enact the necessary legislation or the state fails to enter into or renew the agreements aforesaid, pre-existing federal health care programs may then be discontinued.

In effect, the "Act" is a Congressional wedge which has been hammered between a state's ability to tax and spend. It removes from the States their essential control over their own destiny, by forcing them to become something akin to administrative districts of a central government. The States, thereby, are severed from their electorate.

Judge Sneed in *Brown v. Environmental Protection Agency*, 521 *F* 2d, 827, 840 (9th Cir., 1975), *cert granted*, 426 *US*. 904 (1976) vacated as moot, 97 *S. Ct.* 1635 (1977) profoundly recited the problem:

> The power of each voter of each state over state expenditures, to the extent not supplied by the federal government, would be less than his power over state taxation. Voters of other states, acting through their representatives in Congress, would dilute the strength of the voters of the states whose revenues would be spent as Congress directs. A structure in which all power on the part of the states to spend was vested in Congress while the power and obligation to tax remained with the States would encourage few even casually acquainted with the writing of Montesquieu and the Republican form of Government. Nor could such an assertion be made were all taxation and expenditure responsibility to reside in the Federal government.

Was not the creation of the Senate in Article I of the Constitution of the United States exemplary of the States' interest in preserving their respective republi-

can integrity? Iredell (N.C.) in Elliot, ed., *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* (Washington, 1854), IV, 38; Ames (Mass.), Madison (Va.) and Parsons (Mass.) in Elliot, ed., *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* (Washington, 1854) II, 46, III, 94, 95, II, 26; *The Federalist*, No. 62 at 415 (Cook, ed., 1967). Certainly the inclusion of the "guaranty clause" in Article IV, Section 4, is conclusive.

The "Act" in question, by requiring the enactment of specified legislation by the States, and directing the allocation of state resources and revenues to state agencies, crated under the "Act," separates the taxing from the spending powers. The citizens of the respective states are thus deprived of essential control over state expenditures. Now, large, populous states may veto the activities of smaller states through Congressional pressure. Such amounts to a blatant abandonment of the most fundamental compromise during the Constitutional Convention of 1787. The compact was agreed to by smaller states only upon specific assurances that their relative integrity, as independent sovereigns, would remain undisturbed. Wrote James Madison:

> "... the equal vote allowed (in the Senate) to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small states; since they are not less solicitous to guard by every possible expedient against an improper consolidation of the States into one simple republic.

The Federalist, No. 62. (Cook ed., 1967) at 417.

Where as this Honorable Court was not enabled to examine this immensely important issue in *Brown v. Environmental Protection Agency*, supra, and *Maryland v. Environmental Protection Agency*, 530 *F.* 2d 215 (4th Cir., 1975), *cert granted*, 426 *U.S.* 904 (1976), *vacated as moot*, 97 *S. Ct.* 1635 (1977) though it announced its intention of doing so, the instant appeal draws the issue with clearer, more distinct, lines.

The "Act" in question, under 42 *U.S.C.* Subsections 300 m-2 (a) (1), 300 m-1 (b) (1) and 300 m-1 (b) (4-6), specifically places State agencies, whether federally funded or not, under federal control. There simply exists no appropriate nexus between federal taxation and spending for such pervasive legislation to stand. Congressional power and authority does have limits. Those limits are most readily found in, not the subject matter of the legislation, but, rather, the means by which the power is exercised. As in the instant case, where Congress exercises power so as to interfere with the basic control citizens have over the raising and spending of local revenues, and their security under local, representative government, then the Congress has breached a historic Constitutional "promise" and guarantee to large states as well as small. The "Act" must be found violative of the "guaranty clause of Article IV, Section 4 of the Constitution of the United States.

C. The National Health Planning and Resources Development Act of 1974, By Its Compulsory Regulation of State Heatlh Care Administration and Spending, Undermines the Sovereignty and Vitality of State Government Guaranteed by the Fundamental Structure of the Government of the United States.

Article I of the Constitution of the United States

establishes a bicameral legislative branch of government, assuring for all states a fundamental equality in national representation, and, thereby, protecting against the encroachment by Congress of the sovereignty and vitality of state government. Articles I, II, and III in concert establish the national scheme of government, yet those articles, together, also impose serious limitations upon each of the three coordinate branches of government. Guarantees of personal liberty must be found in the fundamental structure of government just as judical review was so found by implication. *Marbury v. Madison,* 5 *U.S.* (1 Cranch) 137 (1803). *Vested rights* have their historic recognition in the structure of government. Wrote Mr. Justice Story:

> That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred.

Wilkinson v. Leland, 27 *U.S.* (2 Pet.) 627, 657 (1829)'.

Protection of the rights to property is implied. Based upon the history of the drafting and ratification of the Constitution of the United States, is not the sovereignty and legitimacy of the States also implied? The Association submits that the fundamental structure of the government of the United States, when coupled with both the Tenth Amendment and the "guaranty clause" of Article IV, Section 4, admits of no other interpretation.

Arguing against a Bill of Rights, James Wilson, in the Pennsylvania Ratifying Convention, stated that the people clearly limited the delegation of power in

the new federal constitution. "Congressional power," he said, "is to be collected . . . from the *positive* grant expressed in the instrument of the union." Wood, *The Creation of the American Republic,* 1776-1787, 559 (Chapel Hill, 1969).

If, as the Preamble states, the power of Congress emanates from that which was explicitly surrendered by the people, and, the states antedated the creation of the compact of union in which compact they are guaranteed a republican form of government, reserved powers not surrendred or retained by the people, and made necessary components in the ratification and amending processes, then does not logic command the argument which, like the doctrine of *vested rights,* holds that the fundamental structure of government, irrespective of the Tenth Amendment, guarantees the continued sovereignty and vitality of the States? The Association firmly believes that such an implied guarantee exists, and that this Honorable Court specifically recognized it in *National League of Cities v. Usery,* supra.

Neither the "commerce clause" of Article I, Section 8, clause 3, nor the "taxing and spending power" of Article I, Section 8, Clause 1 may overcome that sovereignty reserved in the several states by the people. Therefore, based upon the fact that the states existed prior to the federal convention of 1787; that those states were represented therein; that the states remained a necessary component of both the ratification and amending processes; that the states were guaranteed a republican form of government and protected against domestic violence; that they were reserved power not surrendered to the government of the United States or reserved by the people; and, that all national power

was specifically derived from the "supreme authority of the people themselves," and through the people, the continued existence of the states was, constitutionally, recognized, any attempt by the Congress to undermine the function of state government is violative of that popular command embodied in the Constitution. See: Madison, Gorham, King, Williamson, and Morris, in Farrand, ed., *Records of the Federal Convention,* II, 93, 90-92, I, 123, II, 476, 92, 93, II, 92, 93, I, 123 (New Haven, 1911).

By "coercing" states to enact specific legislation and controlling the expenditure of state revenues in the field of health care, the Congress has proceeded beyond its fundamental grant of power and authority. The people specifically did not deliver unto the Congress of the United States the power to interfere with, impede or undermine the functions of state government.

The method the Congress has chosen to implement its program is abusive to that structure of government created, preserved and protected by the people. The "Act" is thus violative of those enumerated powers embodied in Article I of the Constitution of the United States, and of that structure of government, both expressed and implied, created by that compact of union.

II.

THE FEDERAL GOVERNMENT AND THE INDIVIDUAL

The Constitution of the United States, through the Doctrine of Separation of Powers, Reaffirms the Principle that the Doctrine of *Vested Rights* is preeminent in Our Organic Law.

The Association submits to this Honorable Court

that the Constitution of the United States, in its establishment of the three coordinate branches of government, was designed, quite independently of the Bill of Rights and the Fourteenth Amendment, to protect the properties and advance the liberties of citizens. As all national powers are derived specifically from the people, those powers so surrendered were enumerated. Those that were not surrendered were specifically reserved by the people. Such was later expressed explicitly in the Ninth and Tenth Amendments. Therefore, as Congress, through its enumerated powers might reflect majority will, that will could not be superior to the sum of its parts!

The people reserved for themselves, individually, the right to acquire and possess property, and ordained and established the Constitution, in order to, among other things, "secure the Blessings of Liberty."

Again, independent of the Bill of Rights and the Fourteenth Amendment, the Constitution of the United States provided for a "general restraint" upon the legislature in favor of private rights. Spoke Daniel Webster while arguing the case of *Wilkinson v. Leland,* supra, at 646-647:

> If, at this period, there is not a general restraint on legislatures, in favor of private rights, there is an end to private property. Though there may be no prohibition in the Constitution, the legislature is restrained from acts subverting the great principles of republican liberty and of social compact.

The underlying doctrine of American Constitutional Law, a doctrine without which, indeed, it is inconceivable that there would have been any Constitutional Law, is the doctrine of *vested rights.* Corwin,

"A Basic Doctrine of American Constitutional Law," 12 *Mich. L. Rev.* 247 (1914). The fundamental character of the property right was asserted repeatedly on the floor of the federal convention. Farrand ed., *Records of the Federal Convention*, I, 424; 533-534, 541-542, II, 123 (New Haven, 1911). It was thus not accidental that the doctrine of *vested rights* was brought within the purview of the Constitution by a member of that convention, namely, Mr. Justice Patterson, in *Van Horne's Lessee v. Dorrance*, 2 *U.S.* (2 Dall.) 304, 310 (1795). Mr. Justice Patterson stated:

> The right of acquiring and possessing property and having it protected is one of the natural, inherent and unalienable rights of man. Men have a sense of property: property is necessary to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of a community in which he could not enjoy the fruits of his honest labor and industry. The preservation of property, then, is a primary object of the social compact.

As Chancellor Kent wrote, "Liberty depends essentially upon the structure of government . . ." Corwin, "A Basic Doctrine of American Constitutional Law," 12 *Mich. L. Rev.* 247, 262 (1914), *c.f.* Kent, *Commentaries*, 332.[4]

The National Health Planning and Resources De-

[4]Such a doctrine represented the "point of view of the founders of American Constitutional Law who saw before them the same problem that had confronted the convention of 1787, namely, the problem of harmonizing majority rule with minority rights, or more specifically, republican institutions with the security of property, contracts and commerce." Corwin, "A Basic Doctrine of American Constitutional Law," 12 *Mich. L. Rev.* 247, 276 (1914; See Also: Corwin, "The Higher Law Background of American Constitutional Law," 42 *Harv. L. Rev.* 365, 390 (1928-1929).

velopment Act of 1974 requires each state to enact "certificate of need" legislation under which no health care facility may be built, equipped, expanded, or modernized without state approval. The program applies to all institutional health care services whether government funded or not. 42 *U.S.C. Su*bsection 300 m-2 (a). Even a private citizen using private funds to build a private clinic may be forbidden from doing so if the state agency, through the Appellee Secretary, finds the clinic not "needed."

Under the "Act" the state agency is given authority to determine whether "existing facilities" — even private facilities — "are in need of modernization or conversion to new uses." 42 *U.S.C.* Subsection 300 o-2 (a) (4) (C). The Association submits that a substantial number of its members own and operate private clinics and hospitals which receive no government funding whatsoever. Those individuals are in danger of losing the very private character of their property, and, hence the property itself.[5]

The Constitution of the United States, by its very spirit and meaning, prohibits legislative interference in the acqusition and mantenance of private property. There does exist a *vested right* to acquire and protect private property. It is a fundamental reason for social compact. Nowhere could it be plausibly found that the people surrendered such rights of control over their

[5]Private property can, under this "Act" be "eliminated." See: 4 *U.S. Code Congressional and Administrative News*, 7842, at 7890 (93rd Congress, Second Session, 1974). Where it is stated: "If a state health planning and development agency acts to modify or discontinue any existing health facility, institutional health service, or health maintenance organization, the local health planning agency is directed to assist the affected entity in improving or eliminating such service."

property to the Congress. The inclusion in the Constitution of the United States of the Fifth and Fourteenth Amendments only confirmed this time-honored principle.

For the Congress to so interfere in the acquisition and possession of private property contravenes a *vested right* as old as *Magna Charta*, and recognized in the structure of the federal government as well as in both the Fifth and Fourteenth Amendments to the Constitution of the United States. Manifestly, the "certificate of need" device simply cannot be used to convert a private facility into a public one. *Frost & Frost Trucking Co. v. Railroad Commission*, 271 *U.S.* 583 (1926); *Smith v. Cahoon*, 283 *U.S.* 553 (1931).

III.

THE NATIONAL HEALTH PLANNING AND RESOURCES DEVELOPMENT ACT OF 1974 INVADES THE PROTECTED PRIVACY, AND PROFESSIONAL DECISION-MAKING PROCESS OF THE PRACTICE OF MEDICINE, AND, EMPOWERS THE UNITED STATES WITH AUTHORITY, PROHIBITED BY THE CONSTITUTION, TO IMPAIR THE INDIVIDUAL'S VESTED RIGHT TO PRACTICE MEDICINE

The Association submits to this Honorable Court that Congressional power to enter the field of national health planning appears in doubt. The effect of the National Health Planning and Resources Development Act of 1974 will be felt not only by institutional health care providers who may or may not be funded at all by the federal government, but also by practitioners of private medicine. To them there is no "option" under this legislation.

Traditionally, the state had a narrow interest in controlling the delivery of health care and the practice

of medicine. As stated in *Dent v. West Virginia*, 129 *U.S.* 114, 121-222 (1889):

> It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue the prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken.

See also: *Meyer v. Nebraska*, 262 *U.S.* 390, 399 (1923); and *Barsky v. Board of Regents, of the State of New York*, 347 *U.S.* 442, 459 (1954) (Black, dissenting).

Regulation of the practice of medicine has been, historically, a state function, but limited to assuring that "only properly qualified persons shall undertake its responsible and difficult duties;" that standards of conduct are maintained, and patients' health and safety are guarded. *Watson v. State of Maryland*, 218 *U.S.* 173, 176 (1910); *Polhemas v. American Medical Association*, 146 *F* 2d 357 (9th Cir., 1944) and *New Jersey Chiropractic Ass'n. v. State Board of Medical Examiners of N.J.*, 79 *F. Supp.* 327 (D.C.N.J., 1948).

Protection of the physician's "right to administer treatment according to his professional judgment" has been explicitly recognized by this Honorable Court.

Roe v Wade, 410 *U.S.* 113, 165-166 (1973). Third parties, therefore, have been denied the power to intrude into decisions between a physician and his patient. *Planned Parenthood v. Danforth*, .. *U.S.* .., 96 S. Ct. 2831 (1976).

The Congress under the National Health Planning Act of 1974 is attempting to accomplish two objectives: (1) to remove from the States any limited regulatory power it could exercise under its powers of police; and (2) directly invade the practice of private medicine by placing the government of the United States squarely between the physician and his patient. Under 42 *U.S.C.* Subsection 300 k-1 the Appellee Secretary is empowered with the authority to issue "guidelines concerning national health planning." Included therein will be "standards respecting the appropriate supply, distribution, and organization of health resources." In establishing goals for "national planning," Congress, under 42 U.S.C. Subsection 300 k-2, listed ten such goals including the "development of multi-institutional systems for coordination or consolidation of institutional health services" and the "adoption of uniform cost accounting, simplified reimbursement, and utilization reporting systems and improved management procedures for health service institutions." The goals, among others, are to accomplish the stated purposes of Congress which are to develop "uniformly effective methods of delivering health care;" redistribute "health care facilities and manpower" and lower the cost of health care. 42 U.S.C. Subsection 300 k (a) (3) (A) (B) (C). Health Systems Agencies, State Health Planning and Development Agencies and Statewide Health Coordinating Councils, required to be established under the "Act," are responsible for implement-

ing those goals and priorities. 42 U.S.C. Subsections 300 1-2, 300 m-2, 300 m-3 (c). All such agencies are created according to the requirements of the "Act." and are answerable, ultimately, to the Appellee Secretary. 42 U.S.C. Subsections 300 1-1 through 300 1-4, 300 m through 300 m-2, 300 m-3 through 300 m-5.

Though the withdrawal of pre-existing grant programs are used by Congress to force the States to enact requisite "certificate of need" legislation and enter into the required agreements with the Secretary, the immense effect and impact of this legislation is directed toward the *health care providers* who, in large part, are private individuals or organizations. Congress has developed no fiscal nexus with the private practitioner to implement such pervasive legislation.

The effect of the "Act" simply cannot be reconciled with this Honorable Court's rigid recognition of the physician's right to administer treatment according to his professional judgment. *Roe v. Wade*, supra; *Planned Parenthood v. Danforth*, supra. "Certificate of need" decisions, by controlling the "appropriate supply, distribution and organization of health resources," necessarily restrict, and potentially veto, physicians' judgments regarding diagnosis, treatment and hospitalization. The magnitude of federal power and authority over the practice of private medicine found in the "Act" is limited only by the extent of one's imagination.

Where, the Association asks, has that sanctity and privacy fundamental in the practice of medicine been respected by Congress in the enactment of this "Act"? This Honorable Court has, in the past, stated the "certificate of need" device cannot be utilized to convert a

private facility into a public one. ***Frost & Frost Trucking Co. v. Ralroad Commission***, 271 U.S. 583 (1926); and see *Smith v. Cahoon*, 283 *U.S.* 553 (1931). Likewise, the Congress cannot utilize such a device to convert the practice of private medicine and the limitless decisions and considerations embodied therein into a public enterprise. Is there not an "estate" created in the practitioner with reference to his practice? ***Dent v. West Virginia,*** supra. Is not the professional judgment of a physician immune from third-party interference? *Roe v. Wade*, supra.; and *Planned Parenthood v. Danforth*, supra. What "option" not to participate has been offered by Congress under the "Act" to the private physician or health care organization?

The Appellee relies heavily upon the language of Mr. Justice Cardozo in *Steward Machine Co. v. Davis*, 301 *U.S.* 547 (1937) to illustrate the "national dimensions" of the problems in health care. Whereas the Association has always regarded the aforementioned decision as based on expediency rather than law, it, nevertheless, submits that the use of the case has no merit. Congress, in the "Act" in question, has, itself admitted that "the massive infusion of *Federal funds* into the existing health care system has contributed to inflationary increases in the cost of health care . . ." 42 *U.S.C.* Subsection 300 k (a) (2). Where shall we draw the line? How many persons shall lose their liberty and property because Congress indulged itself too freely in the spending of money? The Association submits that, constitutionally, Congress cannot invade the privacy of the practice of medicine; nor can it interpose its veto upon the professional judgment of a practitioner of private medicine. Likewise, the Association

submits, Congress cannot, constitutionally, "redistribute," "consolidate," "coordinate" or control the delivery of health care services without impairing *vested rights* to property heretofore recognized by this Honorable Court. Unless the Court accepts Franklin Roosevelt's assertion that the "right to adequate medical care and the opportunity to achieve and enjoy good health" is embodied in our organic law,[6] and may supercede basic political and property rights, then the "Act" must be declared unconstitutional as violative of the fundamental structure of government, and the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States.

It is known by all citizens of this republic that, since 1932, there has been an explosive growth of federal bureaucracy and control, costing hundreds of billions of dollars to finance. Is the price citizens of this republic must pay for the failure of those programs or the inflation created by such programs to be the loss of property and *vested rights?* The practice of medicine remains an endeavor the privacy of the decisions in which are protected by the First, Ninth and Tenth Amendments. Additionally, the practice of medicine itself, outside of considerations of consumers' interests in safety and competence of practitioners, remains a vested property right protected by the structure of government and the Fifth, Ninth, Tenth and Fourteenth Amendments.

The arbitrariness of the "Act" may well be found

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[6]**Message from the President of The United States on The State of the Union, H.R. Doc No. 377, 78th Cong., 2d Sess,, in 90*Cong. Rec.* 55 (1944).**

in its purpose clauses as well as in the fact that the health care providers who are being regulated and controlled are given no "options." The "Act" forces compliance, and must be declared unconstitutional.

CONCLUSION

For all the foregoing reasons, the Association of American Physicians and Surgeons, Inc., as *Amicus Curiae,* respectfully requests this Court to note probable jurisdiction and declare the National Health Planning and Resources Act of 1974 unconstitutional.

Respectfully submitted,

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